



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

March 24, 2006

Mr. Michael L. Hartman  
Assistant District Attorney  
Fort Bend County District Attorney's Office  
301 Jackson  
Richmond, Texas 77469

OR2006-02931

Dear Mr. Hartman:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 244735.

The Fort Bend County District Attorney's Office (the "district attorney") received a request for video recordings and polygraph information related to two specified cases. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the district attorney's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. In this instance, you state that the district attorney received the instant request on December 27, 2005. Thus, the fifteen-business-day deadline to submit the information required by section

552.301(e) was January 19, 2006.<sup>1</sup> However, the district attorney did not submit the requested videotapes for our review until January 31, 2006. Consequently, we find that the district attorney failed to comply with the requirements of section 552.301 with respect to these videotapes.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). The district attorney's claim under section 552.108 is not a compelling reason for non-disclosure under section 552.302, therefore the submitted videotapes may not be withheld on that basis. *See* Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 586 at 2-3 (1991). However, as section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your arguments under that exception for the submitted videotapes, as well as the remaining submitted information.

Next, we note that both report numbers 04-0052 and 04-24076 contain information relating to polygraph examinations. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by other statutes. Access to information obtained during the course of a polygraph examination is governed by section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

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<sup>1</sup>We note that Fort Bend County offices were closed on January 2, 2006 and January 16, 2006.

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. We have marked the polygraph information that is subject to section 1703.306. We note, however, that the requestor identifies himself as an attorney for one of the polygraph examinees. The statutory access provision in section 1703.306(a)(1) of the Occupations Code is more specific than the general protection afforded to broader categories of information under sections 552.108 of the Government Code and 261.201 of the Family Code. Where information falls within both a specific and a general provision of law, the specific provision prevails over the general. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex.2000) (“more specific statute controls over the more general”); *Cuellar v. State*, 521 S.W.2d 277 (Tex.Crim.App.1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). Therefore, if the requestor has a right of access to his client's polygraph information under section 1703.306(a)(1), that information may not be withheld from him on the basis of either section 552.108 or 261.201, but instead must be released to the requestor. We note, however, that the requestor does not have a right of access to the polygraph information of the other examinee. In the event that the requestor does not have a right of access to his client's polygraph information, the district attorney must withhold the polygraph information of the requestor's client, in addition to that of the other examinee, under section 552.101 in conjunction with section 1703.306.

We now address your arguments regarding the remaining information. Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides, in relevant part, as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Based upon our review, we find that report number 04-9952 and the submitted videotapes were used or developed in an investigation under chapter 261; therefore, this information is within the scope of section 261.201 of the Family Code. You have not indicated that the district attorney has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the remaining information in report number 04-9952 and the submitted videotapes are confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the district attorney must withhold this information from disclosure under section 552.101 as information as information made confidential by law. However, with regard to report number 04-24076, we find that you have failed to demonstrate that this information is a report of alleged or suspected abuse or neglect under chapter 261, or was used or developed in an investigation of abuse or neglect under chapter 261. We therefore determine that section 261.201 is not applicable to the remaining report, and the district attorney may not withhold it under section 552.101 on that basis.

You also claim that remaining information in report number 04-24076 is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You represent that report number 04-24076 pertains to a pending criminal investigation. Based on your representation and our review, we determine that the release of this information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per*

*curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. See 531 S.W.2d at 185. Thus, with the exception of basic information, the district attorney may withhold the remaining information in report number 04-24076 pursuant to section 552.108(a)(1). We note that you have the discretion to release all or part of this information that is not otherwise confidential by law. Gov't Code § 552.007.

In summary, if the requestor has written authorization to obtain his client's polygraph information, the district attorney must release such information to him. However, if the requestor does not have such a right of access, then all of the marked polygraph information must be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The district attorney must withhold the remaining information in report number 04-9952 and the submitted videotapes pursuant to section 552.101 of the Government Code in conjunction with 261.201 of the Family Code. Except for basic information, the district attorney may withhold remaining information in report number 04-24076 pursuant to section 552.108(a)(1) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Caroline E. Cho  
Assistant Attorney General  
Open Records Division

CEC/sdk

Ref: ID# 244735

Enc. Submitted documents

c: Mr. Michael McLane  
P.O. Box 31536  
Houston, Texas 77231  
(w/o enclosures)